IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

WEDNESDAY, THE 20TH DECEMBER 2006 / 29TH AGRAHAYANA 1928

El.Pet..No. 5 of 2006()

PETITIONER:

JOHN NEDIYAPALA, AGED 53,
S/O. CHACKO, NEDIYAPALA HOUSE, NEYASSERI VILLAGE,
THODUPUZHA TALUK, IDUKKI DISTRICT.

BY ADV. SRI.P.JACOB VARGHESE
SRI.V.MANOJ KUMAR
SRI.VIVEK VARGHESE P.J.
SRI.P.K.SOYUZ
SRI.REGI G.NAIR

RESPONDENT:

P.J. JOSEPH, AGED ABOUT 60,
S/O. JOSEPH, RESIDING AT PALATHINAL HOUSE,
PURAPUZHA VILLAGE, THODUPUZHA TALUK, IDUKKI DIST.

BY ADV. SRI.M.K.DAMODARAN (SR.)
SRI.NOBLE MATHEW
SRI.P.K.VIJAYAMOHANAN

THIS ELECTION PETITION HAVING BEEN FINALLY HEARD ON 22/09/2006, THE COURT ON 20/12/2006 DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN, J.

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E.P.No. 5 OF 2006

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Dated this the 20th day of December, 2006.

O R D E R

Petitioner, an elector, challenges the election of the respondent from No.082 Thodupuzha L.A. Constituency to the Kerala Legislative Assembly in the election held on 22-4-2006.

2. Going by the election petition, the respondent secured 68641 votes and his nearest rival Sri.P.T.Thomas secured 54860 votes and one M.J.Jacob was the election agent of the respondent.

3. The respondent has filed a statement of preliminary objections and has stated that the maintainability of the election petition, including the question whether it discloses a triable cause of action, may be heard as a preliminary issue. The election petitioner has filed objections to the said preliminary

objections of the respondent.

4. Though no specific provision in Section 100 of the Representation of the People Act, 1951, "Act", for short, is quoted in the election petition, the allegations are made with reference to Section 123(4) of that Act, thereby to be considered as falling under Clause (b) or (d)(ii) Sub-section (1) of Section 100 of the Act.

5. Under Section 123(4), the publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election, shall be deemed to be corrupt practice for the purpose of the Act. If that corrupt practice is committed by the returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent, it would fall within the vice of Section 100(1)(b) and if it is committed by an agent other than the

returned candidate, election agent and and if the result of the election, in so far as it concerns the returned candidate, has been materially affected thereby, it would fall within Section 100(1)(d) of the Act.

6. In **S.N.Balakrishna v. Fernandez (AIR 1969 SC 1201)**, it was laid down that where a corrupt practice is charged under Section 123(4), against an agent, the petitioner, to get the benefit of not having to prove the effect of the corrupt practice upon the election and to establish that the case falls under Section 100(1)(b) and not under Section 100(1)(d), must prove consent on the part of the returned candidate to the commission of the corrupt practice. It was noticed that Section 100(1)(b) makes no mention of an agent while Section 100(1)(d) specifically does. Accordingly, it was held that if the petitioner fails to prove consent on the part of the returned candidate, then to establish corrupt practice avoiding the election, conditions required by Section 100(1)(d) read with Section 123(4) will have to be satisfied. Hence, it will have to be established not only (a) that the statement was made by an agent (b) that it was false etc. (c)that it related to the personal character and conduct of defeated candidate (d) that it was reasonably calculated to harm his

chances but also (e) that it, in fact, materially affected the result of the election, in so far as the returned candidate is concerned. In **V.Narayanaswamy v. C.P.Thirunavukkarasu [(2000) 2 SCC 294]**, it was laid down by the Apex Court that to plead corrupt practice as contemplated by law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected and still further that it cannot be left to time, chance or conjecture for the court to draw inference by adopting an involved process of reasoning. The Apex Court stated that where the alleged corrupt practice is open to two equal possible inferences, the pleadings of corrupt practice must fail. Charge of corrupt practice being a quasi-criminal in nature, the court must always insist on strict compliance with the provisions of law. It was accordingly held that in such a case (election petition), it is equally essential that the particulars of the charge of allegations are clearly and precisely stated in the petition.

7. The allegations in paragraphs 9 to 14 which constitute the pleadings regarding the allegation of corrupt practices are made on the basis of information. In

verifying the said facts and in his affidavit in Form 25 under Rule 94A of the Code of Election Rules, 1961, "CE Rules", for short, the petitioner has not disclosed the source of such information.

8. The allegations in paragraph 9 can be summarised into different categories.

8A. The first allegation is that "padayathra" (march) was organised by the respondent on 28-3-2006 and in a meeting at Mangattukavala, attended by the respondent, his election agent and certain other persons who are described as supporters of the respondent, Sri.M.C.Mathew made certain utterances which are quoted. But the said M.C.Mathew is not described as an agent of the respondent. So much so, any action by him, even if it amounts to corrupt practice under Section 123(4), would disclose a cause of action only if there is allegation that he committed that act with the consent of the respondent or his election agent. There is no plea to that effect. Hence, no cause of action is made out on that count.

8B. The next is that similar "padayathras" were organised and a television channel telecast the

entire "padayathra" and the meeting on 28-3-2006 on all following days till the polling day. Annexure-I is the CD of that programme. Annexure-IA is the transcript and Annexure-IB is the English translation of the speech. It is the allegation that the said CDs were widely circulated. Such statements by themselves do not constitute any corrupt practice.

9. The allegation in paragraph 10 relates to a meeting stated to have been organised on 6-4-2006 at an auditorium in Thodupuzha.

9A. The aforesaid M.C.Mathew is alleged to have made certain different utterances regarding corruption. However, as already noticed, M.C.Mathew is not pleaded to be an agent of the respondent. Nor is there any pleading that he made such utterances with the consent of the respondent.

9B. The second allegation in paragraph 10 is that in that meeting Sri.M.J.Jacob, the election agent made a statement to the following effect:

"Yesterday there was a convention taunted

> with extravagance and corruption we now that. But our convention is different. Not with lined crowd. My request is that similar to the commercial advertisements that we should defeat the UDF candidate who has cheated us through confidence cheating. On further analysis I follow the words of the wise people that about the advertisement of gamblers who say all can participate at any time in any manner."

The aforesaid does not constitute any allegation against any particular person. If at all, there is no attack on the personal character.

9C. Annexure-II is a CD which is stated to have been made out recording the aforesaid statements of M.C.Mathew and M.J.Jacob. Annexure-II(A) is a transcript of the contents of Annexure-II and Annexure-II(B) is its English version.

9D. There is a statement in paragraph 10 that similar "padayatras" were organised all over the constituency and a television channel telecast the "padayatras" and the speeches. That by itself is no corrupt practice.

10. Annexure-IA and Annexure IIA are stated to be the CD versions of the reported statements of M.C.Mathew pleaded in paragraphs 9 and 10 of the election petition without even stating that M.C.Mathew is an agent of the respondent.

11. Paragraph 11 contains certain general statements of use of loud speaker, vehicles etc. and a consequential complaint before the Election Observer. The seizure of a vehicle from one Roy Chacko is pleaded. It is also pleaded that at the time of the seizure of the said vehicle Smt.Beena Biju and Smt.Sheela Stephen were at the place of seizure and they were addressing a crowd standing by the side of the jeep. The said Beena and Sheela are alleged to have made announcements making false allegations against Sri.P.T.Thomas. The statements uttered by them are not pleaded. What is the nature of the criticism made by them, is not disclosed. Beena, Sheela and Roy Chacko are not pleaded to be the agents of the respondent, though I may notice that it is stated that the announcements were made with the knowledge and active connivance of the respondent. The pleadings in the said paragraph are too vague to be treated as a corrupt practice under Section 123(4) to be put to trial.

12. Paragraph 12 of the election petition refers to a press conference held by the respondent on 10-4-2006 and its report in the Madhyamam daily published by one P.K.Prakash. Annexure-IV is the report of the said press conference and Annexure-IV(A) is the English version of the publication. In the nature of the case it is apposite to quote the published material (in its English version), which is as follows:

"Madhyamam Daily-Kottayam Edition-11.04.2006

In the Box

Minister K.M.Mani is fooling the public in Revenue Tower issue-P.J.Joseph.

Thodupuzha-

P.J.Joseph, Chairman of Kerala Congress J accused that Minister K.M.Mani is fooling the public of Thodupuzha in the matter of Revenue Tower issue. That Mani is already caught corruption in the Revenue Tower issue. That K.M.Mani and P.J.Thomas M.L.A. are bound to explain as to what happened to the bribe money. And if they are disclosing the Lok Ayukth would deal with it. P.J.Joseph warned during the press conference that some of the property is involving of expenditure from the Finance Department the Congress would be imprisonment. Finance Department has restricted not to issue more than

Rs.10.55 crores but the expected expenses is Rs.17.12 Crores. In order to get over the restrictions the construction work is decided in to different stage. For even the civil stage, Rs.6 Crores is required and the major portions are to be completed thereafter. The Government already constructed civil station expending Rs.4 Crores and whenever there is civil station, the Govt. do not construct Revenue Tower by spending Rs.2 Crores additional building can be constructed for which pressure is already there. It is at this juncture that land with Rs.150 Crores is worked. The extend of the land is one and half acres also will fetch estimated value of 150 Crores. That Mani and Thomas are bound to disclose to the Thodupuzha people as to what consideration they have received.

The statement of Mani that as 12 Govt. offices also are functioning in the civil station is false. The permission for revenue tower is obtained by misrepresenting that in spite of Mini Civil Station about 50 govt. offices are functioning in rented premises whereas only 13 officers are in the rented premises. Even if there are shifted to revenue tower, these rents will have to be paid. Apart from civil station office 40 offices are having own building complexes.

Therefore by making false documents, intentionally corruption is committed. Oommen

> Chandy shall also answer to the corruption. Lok Ayukth would deal with P.T.Thomas. I need not say, just said. Nayanar Govt. built 3 ½ Lakhs houses for the poor. But since the funds are diverted by corruption the Housing Board of Mani could not construct even 10000 houses. Mani always escaped since he used to intelligently move, but not this time. In the matter of revenue tower minimum 6 Crores corruption is committed. Is it how election expenses are raised, asked P.J.Joseph, and also distributed copies of project reports submitted to Government stating that only 12 offices are functioning in the Mini Civil Station."

13. Annexure-IV(A) shows that the respondent is reported to have made allegations of corruption against K.M.Mani and that K.M.Mani and P.J.Thomas are bound to explain as to what happened to the bribe money. A reading of Annexure-IV(A) as a whole would not show that any allegation of corruption or having received bribe, has been levelled against Sri.P.T.Thomas while he is called upon along with Sri.Mani to disclose the details. It is also stated in Annexure-IV that Oommen Chandy will also answer to the corruption. Referring to the press conference leading to Annexure-IV, the pleading of the petitioner in paragraph 12 of the election petition is that the

statements are made therein relating to Sri.P.T.Thomas and such statements are false and that the said publication in the front page of the Madhyamam daily with a caption against Sri.K.M.Mani is highly discriminatory and had led to the loss of votes to Sri.P.T.Thomas. A reading of Annexure-IV(A) does not disclose the publication of any statement of fact in relation to the personal character of Sri.P.T.Thomas and it does not, therefore, constitute any allegation to be tried.

14. From the aforesaid discussion, it can be seen that the allegations in paragraphs 9 to 12 of the election petition do not disclose any corrupt practice, to be put to trial and they do not constitute any cause of action for this election petition. Accordingly, the averments in paragraphs 9 to 12 are struck off.

15. Paragraph 13 of the election petition contains allegations in relation to a meeting stated to have been held on 20-4-2006. Sri.M.J.Jacob, the election agent of the respondent is alleged to have charged Sri.P.T.Thomas of having accepted bribe to abandon the project of Malankara Amusement Park. Certain attendant allegations are also made in relation to the said meeting. The other allegations

in paragraph 13 do not constitute any charge of corrupt practice. The averments in the said paragraph, in so far as they relate to the allegation made by Sri.M.J.Jacob against Sri.P.T.Thomas, disclose a case of corrupt practice referable to Section 123(4). However, the petitioner, who has verified the said statements on the basis of his information, has not disclosed the source of such information.

16. In so far as the averments in paragraph 13 are concerned, though I have noted that the averments against the conduct of Sri.M.J.Jacob may constitute a cause of action to be put to trial, such pleadings verified on the basis of information are not made by disclosing the source of information of each of the material facts that constitute any such corrupt practice.

17. Paragraph 14 of the election petition does not disclose any particular allegation but contains only general statements.

18. As already noted, the petitioner has not disclosed the source of information regarding the material facts constituting the alleged corrupt practices. Not only that, the preliminary objections filed by the respondent are

sought to be impinged by the election petitioner by filing further objections to that. The learned counsel for the respondent has, therefore, specifically urged that though the defects have been pointed out as per the statement of preliminary objections filed on 11-8-2006 with notice to the petitioner on 9-8-2006, even if any defect is curable, such defects have not been cured and by filing the objections to the preliminary objections of the respondent, the election petitioner has demonstrably pressed for consideration of the election petition without curing such defects and therefore, the said defects have become fatal to the election petition.

19. In **F.A.Sapa v. Singora [(1991) 3 SCC 375]**, it was held by the Apex Court that defects in verification of the election petition, as also the defects in the affidavit in the prescribed Form 25 can be cured. That judgment was followed in **H.D.Revanna v. G.Puttaswamy Gowda [(1999) 2 SCC 217]** and in **Vijay Laxmi Sadho (Dr) v. Jagdish [(2001) 2 SCC 247]**.

20. In **R.P.Moidutty v. P.T.Kunju Mohammad [(2000) 1 SCC 481]**, after noticing the decision in **F.A.Sapa's** case *(supra)* and those rendered in **Murarka Radhey Shyam Ram**

Kumar v. Roop Singh Rathore (AIR 1964 SC 1545) and **A.S.Subba Raj v. M.Muthiah [(1953) 5 ELR 21 (Mad)]**, it was held that in a case where the defect in verification was pointed out, pressed and pursued, however, the petitioner persisting to pursue the petition without proper verification, the election petition could not be tried. In **R.P.Moidutty** *(supra)*, it was laid down as follows:

> "In the present case the defect in verification was pointed out by raising a plea in that regard in the written statement. The objection was pressed and pursued by arguing the same before the Court. However, the petitioner persisted in pursuing the petition without proper verification which the petitioner should not have been permitted to do. In our opinion, unless the defect in verification was rectified, the petition could not have been tried."

21. Following the decision in **R.P.Moidutty** *(supra)*, the Apex Court in **Regu Mahesh v. Rajendra Pratap Bhanj Dev [(2004) 1 SCC 46]**, posed the question as to what happens when the defect is not cured. It was stated that there is a gulf of difference between a curable defect and a defect continuing in the verification affidavit without any effort

being made to cure the defect. Following **R.P.Moidutty's** case, the Apex Court came to the conclusion in **Regu Mahesh** *(supra)* that the verification having continued to be defective, the case was not liable to be tried.

22. In the case in hand, as already noticed, the respondent filed Statement of Preliminary Objections on 16-8-2006 with notice to the election petitioner on 9-8-2006. The said Statement of Preliminary Objections contains the specific challenge to the sustainability of the verification. So much so, following the ratio of the decisions of the Apex Court in **R.P.Moidutty and Regu Mahesh** *(supra)*, the election petition is defective for want of proper verification and such defect having not been cured in spite of objections, but was pressed for consideration without curing the defects, the same is liable to be rejected.

23. In the result, the election petition is rejected.

24. The substance of this decision shall be communicated to the Election Commission and to the Speaker of the Kerala Legislative Assembly as required by Section 103 of the Act. An authentic copy of this order shall also

be sent to the Election Commission as prescribed.

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

Sha/-